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EXAMINER

CHAPMAN, JEANETTE E

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* RANDAL J. JOLITZ

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Appeal 2009-000180  
Application 10/757,145  
Technology Center 3600

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Decided: October 8, 2009

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*Before:* JENNIFER D. BAHR, MICHAEL W. O'NEILL, and FRED A.  
SILVERBERG, *Administrative Patent Judges.*

BAHR, *Administrative Patent Judge.*

DECISION ON APPEAL

## STATEMENT OF THE CASE

Randal J. Jolitz (Appellant) appeals under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claims 1-23. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002). Appellant's representative presented oral argument on September 22, 2009.

### *The Invention*

Appellant's claimed invention is directed to "a tapered starter block for use in the starter course of a roofing project." Spec. 1, para. [0003]. A starter block substitutes for the roofer's use of additional shingles cut into smaller sections or lumber or other solid building material into a starter strip as a starter course. Spec. 2, para. [0007] and [0008].

Independent claims 1 and 12, reproduced below, are representative of the claimed subject matter.

1. A composite starter block having a unitary construction for facilitating the subsequent positioning of shingles upon a hip roof, said starter block comprising:

a top surface, two side surfaces, a front surface and a back surface;

wherein each of said top surface, said front surface and said back surface has a generally rectangular shape;

wherein the height of said front surface is greater than the height of said back surface;

wherein said two side surfaces are tapered;  
and

wherein a shingle placed flat on said top surface will extend back to said roof without substantially bending.

12. A roofing system for covering and protecting a roof, said roofing system comprising:

a course of starter blocks coupled to the eaves of said roof, with each of said starter blocks having a unitary construction and comprising a top surface, two side surfaces, a front surface and a back surface, wherein each of said top surface, said front surface and said back surface has a generally rectangular shape; wherein the height of said front surface is greater than the height of said back surface; and wherein said two side surfaces are tapered; and

at least one course of shingles coupled to said roof, the first course of said shingles positioned to lie flat on and at least partially overlap said course of starter blocks with said shingles extending back to said roof without substantially bending.

### *The Rejections*

The Examiner relies upon the following as evidence of unpatentability:

Bussey	US 2,142,996	Jan. 10, 1939
Hardy	US 2,193,233	Mar. 12, 1940
Kirkhuff	US 3,852,934	Dec. 10, 1974
Gleason	US 4,279,106	Jul. 21, 1981
Earhart	US 5,953,862	Sep. 21, 1999
Hudson	US 6,199,338 B1	Mar. 13, 2001

Appellants seek review of the Examiner's rejections under 35 U.S.C. § 103(a) of:

- (1) Claims 1-4 and 8-13 as being unpatentable over Kirkhuff and Gleason;

- (2) Claim 5 as being unpatentable over Kirkhuff, Gleason, and Earhardt;
- (3) Claims 6 and 7 as being unpatentable over Kirkhuff, Gleason, and Bussey;
- (4) Claims 12-15 and 19-23 as being unpatentable over Hardy, Kirkhuff, Gleason, and Hudson;
- (5) Claim 16 as being unpatentable over Hardy, Kirkhuff, Gleason, Hudson, and Earhardt; and
- (6) Claims 17 and 18 as being unpatentable over Hardy, Kirkhuff, Gleason, Hudson, and Bussey.

#### SUMMARY OF DECISION

We REVERSE.

#### OPINION

##### *Rejection (1)*

##### *Claims 1-4 and 8-11*

Independent claim 1 requires a “composite starter block having a unitary construction.” Appellant argues that the Examiner’s rejection is in error, *inter alia*, because “Kirkhuff fails to teach or suggest a composite starter block having a unitary construction.” App. Br. 18. In response, the Examiner asserts that Kirkhuff’s block (body member) 72, illustrated in Figure 3, is of a unitary construction. Ans. 11. The Examiner relies on Gleason only for its teaching of tapered side edges (Ans. 5), and not for any teaching directed to a reason to modify Kirkhuff’s eaves starter strip to provide a unitary construction. Appellant urges that, in relying on

Kirkhuff's body member 72 as the starter block having a unitary construction, the Examiner has mischaracterized the teachings of Kirkhuff. Reply Br. 10. Rather, according to Appellant, Kirkhuff describes a starter strip (or starter block) 70, fabricated from three separate parts, namely, a separate body member 72, a separate top plate 74, and a separate bottom plate 76. *Id.* Accordingly, the issue presented for our review is whether the Examiner has mischaracterized Kirkhuff's body member 72 as a starter block having a unitary construction, as called for in claim 1.

We agree with Appellant that the Examiner has mischaracterized body member 72 as a starter block. As pointed out by Appellant, Kirkhuff describes a starter strip (or starter block) 70 fabricated from three integrally joined, but distinct and separate, parts, namely, body member 72, top plate 74, and bottom plate 76. Kirkhuff, col. 8, ll. 31-36; figs. 3 and 4. Therefore, body member 72 is merely one piece of a three-piece starter strip, or block, 70. The starter strip, or block, 70 of Kirkhuff does not have a unitary construction.

We therefore conclude that the Examiner's rejection of claim 1 as being unpatentable over Kirkhuff and Gleason is grounded on a flawed finding that Kirkhuff's body member 72 is a starter block having a unitary construction. We do not sustain the rejection. We likewise do not sustain the rejection of claims 2-4 and 8-11, which depend from claim 1.

#### *Claims 12 and 13*

Claim 12 is directed to a roofing system comprising a course of starter blocks coupled to the eaves of a roof, each of the starter blocks "having a unitary construction" and at least one course of shingles coupled to the roof and "positioned to lie flat on" the course of starter blocks. For the reasons

discussed above with regard to claim 1, Appellant has demonstrated that the Examiner mischaracterized Kirkhuff's body member 72 as a starter block having a unitary construction. Rather, each of Kirkhuff's starter blocks is a three-piece starter strip 70. Thus, the Examiner's rejection of claim 12, and dependent claim 13, is untenable for that reason alone. Moreover, even assuming, *arguendo*, that Kirkhuff's body member 72 could reasonably be characterized as a starter block, by itself, in Kirkhuff's roofing system, the first course of shingles 10 are positioned to lie flat on the top plates 74, not on the body members 72. For that additional reason, the Examiner's rejection of claims 12 and 13 as being unpatentable over Kirkhuff and Gleason cannot be sustained.

*Rejections (2) and (3)*

The Examiner's rejections of claims 5-7, which depend from claim 1, are grounded in part on the Examiner's untenable characterization of Kirkhuff's body member 72 as a starter block having a unitary construction. The Examiner does not rely on any teaching in either Earhardt or Bussey to overcome this deficiency in the rejection of claim 1. Thus, we also do not sustain the rejection of claim 5 as being unpatentable over Kirkhuff, Gleason, and Earhardt or the rejection of claims 6 and 7 as being unpatentable over Kirkhuff, Gleason, and Bussey.

*Rejection (4)*

As already discussed above, claim 12 is directed to a roofing system comprising a course of starter blocks coupled to the eaves of a roof, each of the starter blocks "having a unitary construction" and at least one course of shingles coupled to the roof and "positioned to lie flat on" the course of starter blocks. In rejecting independent claim 12 as being unpatentable over

Hardy, Kirkhuff, Gleason, and Hudson, the Examiner finds that Hardy's concrete starting shingle strips 11 and successive overlying shingle strips 12, 13, and 14 correspond to the starter blocks and shingles, respectively, called for in claim 12. Ans. 6. The dispositive issue presented for our consideration is whether the Examiner erred in reading the starter blocks having a unitary construction and the at least one course of shingles of the roofing system of claim 12 on Hardy's starting shingle strips 11 and successive overlying shingle strips 12, 13, and 14.

Appellant points out that, in accordance with such a characterization of the starting shingle strips 11, Hardy describes other elements, in the form of top plates, placed on top of the starter blocks (starting shingle strips 11). Reply Br. 16. We find that Hardy's roofing system includes poured concrete starting shingle strips 11, covered with a covering 30 of tar paper, a course of shingle strips 12 formed over, and thus positioned to lie flat on, the covering 30 of tar paper, and successive courses of shingle strips 13, 14, 15, etc., separated by successive layers of tar paper, overlying the course of shingle strips 12. Hardy, p. 1, col. 2, ll. 10-14 and p. 1, col. 2, l. 33 to p. 2, col. 1, l. 12; figs. 2, 3, and 5. Accordingly, Hardy's course of shingle strips 12 are positioned to lie flat on the tar paper covering 30, not on the starting shingle strips 11. Thus, even accepting the Examiner's finding that Hardy's starting shingle strips 11 are starter blocks having a unitary construction, Hardy's next course of shingle strips 12 is not positioned to lie flat on the course of starting shingle strips, as required in claim 12. The Examiner does not rely on any teachings in Kirkhuff, Gleason, and Hudson that would make up for this deficiency in Hardy. Accordingly, Appellant has demonstrated error in the Examiner's rejection of claim 12, and claims 13-15 and 19-23,



which depend, either directly or indirectly, from claim 12. We do not sustain the rejection.

*Rejections (5) and (6)*

In rejecting claims 16-18, which depend, either directly or indirectly, from claim 12, the Examiner does not rely on any teachings in Earhardt and Bussey to overcome the deficiency in the rejection of claim 12. Thus, we also do not sustain the rejections of claim 16 as being unpatentable over Hardy, Kirkhuff, Gleason, Hudson, and Earhardt and claims 17 and 18 as being unpatentable over Hardy, Kirkhuff, Gleason, Hudson, and Bussey.

DECISION

The Examiner's decision is reversed.

REVERSED

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